Non-Criminal Grounds of Removability: Advanced Survey and Recent Topic

INA § 212(a)(6)(C)(i): Willful Misrepresentation of a Material Fact

- "Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

What Constitutes a Material Fact?

- "[T]he materiality requirement . . . is satisfied if either (1) the alien is excludable on the true facts or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." Matter of Bosuego, 17 I&N Dec. 125, 128 (BIA 1979; 1980)
    - The Government must show that the facts "would have likely been uncovered and considered but for the misrepresentation," and then the burden shifts to the alien "to establish that no proper determination of inadmissibility could have been made." Id. at 131.
    - The important factor is how the case would have appeared before the consul had he been in possession of all the facts at the time the application was made, if concealment of such facts would have made the alien inadmissible, then such was a material matter. *See* Matter of Avalos Zavala, 11 I&N Dec. 196, 199 (BIA 1965); *see also* Matter of Bosuego, 17 I&N Dec. at 128.

- A fact is material if it would make the alien excludable or has a "*natural tendency to influence, or was capable of influencing,"* the decisions of the government agency. Kungys v. United States, 485 U.S. 759, 770 (1988).

- In Matter of D-R-, 27 I&N Dec. 105 (BIA 2017), the Board exercised its authority to define the term "material" as it applies to INA § 212(a)(6)(C)(i).
    - The Board held that Kungys and Matter of Bosuego should be read together and that a statement is material when (1) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's inadmissibility and (2) would have predictably have disclosed other facts relevant to his eligibility for a visa, other documentation, or admission to the United States. Id. at 112-113.
        - The Board declined to follow the "fair inference" test, but held that it applies to whether the alien procured an immigration benefit by the alien's misrepresentation and not as to whether the misrepresentation is "material." Id. at 112.
        - After the DHS meets its burden of proof, the burden shifts to the alien "to establish that no proper determination of inadmissibility could have been made." Matter of Bosuego, 17 I&N Dec. at 131.